

August 20, 2002

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**
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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **A01P0270**

JOHN O'NEILL
Code Interpretation Appeal Pursuant to KCC 20.20.030.B

Location: 18212 West Lake Desire Drive Southeast

Appellant: **John O'Neill**
18220 E. Lake Desire Drive Southeast
Renton, WA 98058
Telephone: (206) 228-0886

King County: Department of Development and Environmental Services (DDes),
Land Use Services Division, *represented by* **Greg Borba**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-7118
Facsimile: (206) 296-6613

SUMMARY OF DECISION/RECOMMENDATION:

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| Department's Preliminary Recommendation: | Deny appeal |
| Department's Final Recommendation: | Deny appeal |
| Examiner's Decision: | Appeal denied |

EXAMINER PROCEEDINGS:

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|-----------------|-----------------|
| Hearing Opened: | August 15, 2002 |
| Hearing Closed: | August 15, 2002 |

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Wetlands
- Wetland buffer area
- Variance
- Reasonable use exception

SUMMARY: Denies an appeal of DDES interpretation of KCC 21A.44.030 and Public Rule 21A-24-19(C)(3)(a).

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On September 12, 2000, John O’Neill applied for a building permit (File No. B00L1293) to construct a new two-story, single family residence on lakefront property adjoining Lake Desire. According to the site plan, over 5,800 square feet of the lot will be disturbed to accommodate construction of the proposed residence, garage, driveway and yard areas. Subsequent modifications to the proposal have reduced the probable area of ground disturbance to approximately 4400 square feet.
2. The subject lot is 28,425 square feet in area and is currently undeveloped. The shape of the lot is a narrow and long rectangle, measuring approximately 57 feet by 500 feet.
3. A class 1 wetland extends landward on the subject property from the edge of Lake Desire. KCC 21A.24.320 requires a 100-foot wide buffer adjacent to a class 1 wetland. The subject wetland and its required buffer cover most all of the lot, except for a small portion (less than 1,500 square feet) adjacent to W. Lake Desire Drive SE. An unclassified stream is also located along the northern property line of the subject property.
4. On March 13, 2001, DDES notified Mr. O’Neill in writing that wetlands were present on the property and that a wetland delineation would be required. Mr. O’Neill was also apprised that a variance and/or reasonable use exception would likely be required to construct the proposed residence.
5. On November 30, 2001, Mr. O’Neill’s wetland consultant, B-twelve Associates, Inc., notified DDES that a wetland delineation had been prepared. B-twelve’s wetland delineation confirmed that most of the subject property is encumbered by a class 1 wetland and its required 100-foot wide buffer. B-twelve requested a pre-application conference with DDES to discuss the feasibility of obtaining a variance to reduce the 100-foot buffer.
6. On January 3, 2002, the parties conducted a pre-application conference (File No. A01P0270). John O’Neill and Darcey Miller (from B-twelve Associates), and Chad Tibbits, Peshia Klein and Chris Tiffany (DDES) attended.
7. On January 31, 2002, DDES informed Mr. O’Neill in writing that the proposed variance request would not meet the criteria for approval based on Public Rule entitled “Sensitive Areas:

Presumption of Salmonids, Sensitive Area and Buffer Modifications, and Mitigation Requirements.” The pertinent section of the rule provides that a variance may be approved to reduce a buffer on a lot comprising less than 30,000 square feet if no more than 3,000 square feet of the site is disturbed by the structure or other land alteration. Public Rule 21A-24-19(C)(3)(a) became effective May 4, 2000, and was amended on July 19, 2002. This appealed section of the Public Rule was not affected by the amendment.

The Department now concedes that the portion of the public rule at issue here is not a “criterion” but rather a “guideline.” Presumably, a guideline is more flexible than a criterion—a proposition with which the Department appears to agree.

8. KCC 20.20.030(B) provides that at or subsequent to a pre-application conference an applicant may appeal a preliminary determination made by DDES that a proposed development is not permissible under applicable county policies or regulatory enactments. On May 22, 2002, Mr. O’Neill informed DDES in writing of his intentions to appeal the Department’s preliminary determination, specifically the application of the Public Rule that limits the total amount of disturbed area to 3,000 square feet.

CONCLUSIONS:

1. If the Department interprets the public rule at issue—Public Rule 21A-24-019(C)(3)(a)—as an inflexible criterion, then it exceeds the Department’s rule making authority. The Department bases this rule on KCC 21A.44.030.J which reads in pertinent part:

A variance shall be granted by the County only if the Applicant demonstrates all of the following:

...

The variance is the minimum necessary to grant relief to the Applicant;...

As an inflexible criterion, the public rule at issue exceeds the Department’s rule making authority, because it goes beyond, rather than merely implements, the code on which it is based. It sets a standard which the Council did not set. Three thousand square feet may or may not be the “minimum necessary.” Furthermore, the rule prejudices the application before there has been a “case by case” review of the merits of a variance application. Finally, it runs counter to other variance criteria inherent in the case by case review of variance applications—most particularly, KCC 21A.44.030.B, which requires the Department to consider whether the variance is necessary “because of the unique size, shape, topography, or location of the subject property. When a 3,000 square foot limit is set, the KCC 21A.44.010.B criterion unfairly goes out the window.

2. If, however, Public Rule 21A-24-019(D)(3)(a) is merely a (flexible) guideline as the Department now states, then it probably does not exceed the Department’s rule making authority. Rather, it gives the Department and Appellant O’Neill guidance as to the likelihood of a variance approval, denial or plan modification imposed by either the Department or the Examiner.
3. The Appellant should be aware that in the event he proceeds with variance application, that the “minimum necessary” standard has historically been rigorously enforced by both

the Department and the Examiner on appeal. The Applicant may expect that the "minimum necessary" standard will apply to his property more strictly and more severely than the 3,000 square foot guideline contained in the contested public rule. Thus, regardless of whether the Examiner upholds the rule or not, the Appellant will be no better off. Out of the frying pan, into the fire. We cannot and will not evaluate the specific development plans because this is a review of the Department's interpretation of rule and code, not a variance appeal review. However, on its face, the proposal appears to be ripe for redesign and downscaling.

5. For the Department's and Appellant O'Neill's reference, the following documents are attached: A) revised report and decision dated July 3, 2002, regarding the variance application of James (Randy) Newell; and B) the reconsidered report and decision dated August 2, 2002, also regarding the variance appeal of James (Randy) Newell.

DECISION:

Because the Department regards Public Rule 21A-24-019(D)(3)(a) as a "guideline" rather than as an inviolable rule, the appeal of John O'Neill is DENIED. We observe, further, that even if the appeal were granted, it would not solve the Appellant's problem due to the "minimum necessary" variance criterion discussed in the conclusions above.

ORDERED this 20th day of August, 2002.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 20th day of August, 2002, to the parties and interested persons of record:

John O'Neill
18220 W. Lake Desire Dr. SE
Renton WA 98058

Greg Borba
DDES/LUSD
MS OAK-DE-0100

Steve Bottheim
DDES/LUSD
Site Development Services
MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE **AUGUST 15, 2002** PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES (DDES or Department) FILE NO. **A01P0270**
R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing were Greg Borba, representing the Department and John O'Neill, the Appellant.

The following exhibits were offered and entered into the record:

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| Exhibit No. 1 | DDES preliminary report to the Hearing Examiner, dated 8/01/02 |
| Exhibit No. 2 | Statement of Appeal from John O’Neill, dated 5/22/02 |
| Exhibit No. 3 | Letter from DDES to John O’Neill, dated 1/31/02 |
| Exhibit No. 4 | Letter from DDES to John O’Neill, dated 3/13/01 |
| Exhibit No. 5 | Existing conditions map, dated Oct. 2001 |
| Exhibit No. 6 | Proposed site plan, dated Oct. 2001 |
| Exhibit No. 7 | Proposed site plan 2, dated Oct. 2001 |
| Exhibit No. 8 | DDES Public Rule: Presumption of salmonids, sensitive area buffer modifications, and mitigation requirements |
| Exhibit No. 9 | DDES file no. A01P0270 |

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